INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Opinion below	1
Jurisdiction	2
Statute involved	2
Summary statement	2
Holding of the Circuit Court of Appeals	9
Question involved	10
Reasons relied on for the writ of certiorari	10
Conclusion	15

Table of Cases Cited

Bacon v. *Rutland R. R. Co.*, 232 U. S. 134	13
Canavaris v. *Theatres, etc.*, 15 Cal. (2d) 495	14
Central Irr. Dist., In matter of, 117 Cal. 382	12
Compton v. *Jessup*, 68 Fed. 263	12
Crowell v. *Benson*, 76 L. Ed. 598	11
Dobbins v. *City of Los Angeles*, 195 U. S. 223	10, 11
Haese v. *Heitzig*, 159 Cal. 569	12
Hicks v. *Michael*, 15 Cal. 107	14
Home Telephone Co. v. *City of Los Angeles*, 227 U. S. 278	10
Howard, ex parte, 19 L. Ed. 634	12
Jardine v. *City of Pasadena*, 199 Cal. 64	11
Merced Dredging Co. v. *Merced County*, 67 Fed. Supp. 598	14
McCann v. *Union Bk.*, 4 Cal. (2d) 24	14
Mugler v. *Kansas*, 31 L. Ed. 205	11
Napa, etc. v. *Calistoga*, 174 Cal. 411	14
Oklahoma Gas Co. v. *Russell*, 261 U. S. 293	14
Pennsylvania Coal Co. v. *Mahon*, 260 U. S. 393	11
Pennekamp v. *Florida*, 328 U. S. 331	13
Porter v. *Inv. Synd.*, 286 U. S. 471	13
Porterfield, In re, 28 Cal. (2d) 91	15
Raymond v. *Chicago Traction Co.*, 207 U. S. 20	10

Page

Seltzer v. *Musicians, etc.*, 12 Cal. (2d) 718 14
Snowden v. *Hughes*, 321 U. S. 1 11
Thornton v. *Rose Imp. Dist. No. 1*, 291 Fed. Rep. 518 .. 15
Times Mirror Co. v. *City of Los Angeles*, 3 Cal. (2d) 309 11
Yong, ex parte, 209 U. S. 123 11

STATUTES CITED

Constitution of the United States:
Fifth Amendment 8
Fourteenth Amendment 8, 10, 13, 14, 15

Judicial Code, Sec. 240 as amended by Act of February 13, 1925 (28 U.S.C.A. 347-a) 2
28 U.S.C.A. Section 2283 2

OTHER AUTHORITY CITED

Freeman on Judgments, Vol. 1, pp. 952, 955 12

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 853

HENRY WALLACE WINCHESTER, ET AL.,
Petitioners,

vs.

J. D. GREGG, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Petitioners, respondents in the court below, respectfully pray that a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above-entitled Cause on the 14th day of February, 1949 (Rec. Vol. 11, pp. 638-649) and which was amended on March 1, 1949, and as to which a petition for rehearing was filed, and was denied on March 31, 1949 (Rec. Vol. 11, pp. 625-4). The judgment of said Circuit Court of Appeals is final.

Opinion Below

The Circuit Court of Appeals for the Ninth Circuit rendered two Opinions in the case which are not yet reported.

The original Opinion appears in Vol. 11 of the Record at pages 638 to 649 and the Opinion rendered upon the denial of a Petition for Rehearing appears in Volume 11 of the Record at pages 652-4.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 347-a).

Statute Involved

The statute involved is Title 28 U. S. C. A. Section 2283.

Summary Statement

The facts, as shown by the verified complaint herein are as follows:

(1) the map attached to said complaint is a substantially correct representation of an area of land comprising about one and one-half square miles improved, as therein shown with highways; a community park; a community church; chapel and public school; and homes for human residence, which are devoted to said uses (Tr. Vol. 1, p. 60);

(2) the 115 acres of land, as shown upon said map, is referred to as the "Critical" area, the area enclosed with a heavy line is referred to as the "Communty" area, and the area covered by said map is referred to as the "Map" area (Tr. Vol. 1, pp. 4 to 7, incl.);

(3) in 1914 the lands within this community area were restricted by deed to *residential*-agricultural use, and against the production of rock aggregates, for the next twenty years (Tr. Vol. 1, pp. 7, 8 and 10);

(4) many parcels of these lands were sold and developed for *residential* uses (Tr. Vol. 1, pp. 15 and 16);

(5) that in 1918, this area, then known as a part of Hansen Heights, was annexed to the City of Los Angeles (Tr. Vol. 1, p. 10);

(6) in 1919, the residents of this area, in conjunction with those of a larger area, organized Mun. Imp. Dist. No. 9, and bonded their properties for $150,000, to obtain an adequate water supply for this area;

(7) in July, 1925, nearly nine years before the expiration of said deed restrictions, the City enacted its zoning ordinance No. 52,421, by which this community area was declared to be a *residential* area, and from which the mining of rock aggregates was excluded (Tr. Vol. 1, pp. 10 and 11);

(8) in June, 1926; May, 1927; August 15th, 1927; and August 27th, 1927, by its enactment of its ordinances numbers, respectively, 55,129; 57,958, 58,624, and 58,375, *the city reaffirmed* its zoning classification of this community area as a *residential* area, and its exclusion therefrom of the business of mining rock aggregates (Tr. Vol. 1, p. 11);

(9) in June, 1926, and in June, 1928, upon petition of the people, the City consummated proceedings for the concrete paving of about seven and one-half miles of the public streets within said area, and *assessed the costs* of said improvement upon the lands within said area (Tr. Vol. 1, p. 5);

(10) in 1928, upon petition of the people, the City consummated proceedings for the organization of Mun, Imp. Dist. No. 57, and the acquisition and improvement of a fifteen acre public park and recreation center immediately across a forty foot street from this critical area, and *bonded the property* within said community area, for the payment of its cost (Tr. Vol. 1, pp. 14 to 16, incl.);

(11) in June, 1930; February, 1933; September, 1934, and November, 1936, the City by its enactment of its ordi-

nances numbers, respectively, 66,750; 72,327; 74,140, and 77,000 *reaffirmed* its zoning classification of this community area as a residential area, and its exclusion therefrom of the business of mining rock aggregates (Tr. Vol. 1, p. 11);

(12) in August, 1934; July 7th, 1936; July 21st, 1936; July 7th, 1939, and January, 1940, the City Planning Commission reaffirmed its zoning protection of this community, by denying five separate applications for permission to mine rock aggregates within this community area;

(13) in 1942, upon petition of the people, the Remsen Avenue school, located about one-half mile westerly of this community area, and about 900 feet from a potential rock excavation operation, was abandoned, and as a replacement therefor, the Stonehurst School was established within this community area, as shown upon said map, about 600 feet from said critical area (Tr. Vol. 1, pp. 17 to 20, incl.);

(14) in 1944 the City began, and continued through 1945, and until March 7th, 1946, a comprehensive survey of zoning conditions, and on March 7th, 1946, it enacted its comprehensive zoning ordinance, number 90,500, which became effective June 1st, 1946. By this ordinance, the City *reaffirmed* its classification of this community area as a *residential area* (Tr. Vol. 1, pp. 20 to 22, incl. and p. 62);

(15) during the thirty-two year period from 1914 (the year of the deed restrictions), to October 2nd, 1946 (the date of the permit challenged here), this community area, of less than one and one-half square miles, under the encouragement of said deed and zoning protection against the rock industry, was improved with more than 360 homes occupied by more than 1750 persons of whom more than 350 were children under the age of sixteen years; two churches, attended by 418 pupils; and a public park and recreation center attended by more than 200 persons each day, and

2000 persons each week, many of whom are children under the age of six years, who, unattended, patronize the supervised recreational facilities of said recreation center for the maintenance of which the City expends about $6,000 annually (Tr. Vol. 1, p. 48);

(16) during the two and one-half years immediately preceding October 2nd, 1946, fourteen of the home owners in said community area, at a cost to them of more than $150,000, purchased and improved their home properties which lie either immediately adjoining, or immediately across a forty-foot street, from said critical area (Tr. Vol. 1, p. 44);

(17) during this thirty-two year period of *residential* classification, development, use, and protection against invasion by the rock industry, no substantial change in the *residential* character of this community area has occurred (Tr. Vol. 1, p. 31). It is now, and consistently has been throughout that thirty-two year period, a *residential* community (Tr. Vol. 1, pp. 9, and 21 to 22, incl., and 25);

(18) immediately following the effective date (June 1st, 1946) of said comprehensive zoning ordinance, the defendant Gregg applied to the Planning Commission of said City for a permit to excavate said critical area which was then owned by him (Tr. Vol. 1, pp. 27 to 28, incl.);

(19) said application was denied by said Planning Commission, by the unanimous votes of all of its members, on July 25th, 1946, upon the grounds (1) that an excavation for the commercial production of rock, sand, and gravel, was not the highest and best use of said land; (2) that said property is adapted to residential development and use; (3) that the "RA" zoning then upon said property, was appropriate for said property and for that general area, as evidenced by the residential development in that immediate

neighborhood; (4) that the pit which would be left after the excavation was completed, would create an unsightly and dangerous condition, detrimental to the public welfare and safety, and would leave the land in a condition unsuited for use in keeping with others in that community; (5) that the creation of such a condition would adversely affect individual property rights, and would interfere with the normal growth of that community, and (6) would conflict with the objectives of the City's Master Plan of Zoning (Tr. Vol. 1, pp. 28 to 30, incl.);

(20) thereupon the defendant Gregg appealed to the City Council from said ruling, and on October 2nd, 1946, eleven members of the City Council, each of whom on the preceding March 7th had voted to continue said twenty-one year zoning restriction against any excavation for the commercial production of rock aggregates in this community area, voted to grant this permit to the defendant Gregg, to excavate this 115 acre tract to a depth of one hundred feet, or more, *in the heart* of this community area (Tr. Vol. 1, pp. 30 to 33, incl.);

(21) said grant of said permit, was, and is, opposed, not only by the City Planning Commission, but also by the City Board of Education, the Health Department of the City School System, the City Park, Playground, and Recreation Department, the principal and teachers of the School in this community area; the churches; the American Legion Post, and the people throughout a large area of which this community is a part (Tr. Vol. 1, pp. 34, 45, and 48);

(22) the conduct of operations upon this 115 acre tract of land, would produce loud, raucous noises, and dust and dirt, that would be carried to the homes of each of these petitioners, and which would substantially interfere with, and depreciate, the comfortable enjoyment of said homes

by the owners and occupants thereof, and would constitute a substantial detriment to the health of these petitioners, and would substantially interrupt, and interfere with the proper conduct of the school, and the supervised recreational courses of the City Recreation Department, in said public park and in said community area (Tr. Vol. 1, pp. 36 to 38, incl.; pp. 51 to 53, incl., and p. 56);

(23) the pit which would be created by the excavation of said area, would be attractive to children of tender years, and would be a substantial and permanent hazard and danger to the safety of the children of these petitioners.

(24) the conduct of operations under this permit, and the excavation of a permanent pit one hundred feet deep and more than ninety acres in area, *in the heart of this community*, would very substantially disturb each of these petitioners in their comfortable enjoyment of their homes, and would very substantially depreciate the market value of their properties (Tr. Vol. 1, pp. 55 and 56);

(25) the structure and placement of the materials which compose said lands within said critical area, are such that there is a reasonable probability that in the course of time, by natural processes of erosion, or otherwise, the side walls of a pit dug thereon, at their surface would recede, so that said pit would substantially encroach upon the public streets, and upon the improved lands which bound said critical area, and would thereby destroy some substantial portion thereof (Tr. Vol. 1, pp. 35 and 36, and Vol. 2, pp. 568 and 569);

(26) excepting for the petitioner Dell 'Olio, each of these petitioners is an owner of a parcel of land situated within said community area, which is, and for many years has been improved, occupied, and used, as and for residential uses and purposes, and has a reasonable market value in excess

of $12,000, and that each of said petitioners actually resides upon his said property with his family (Tr. Vol. 1, p. 40);

(27) the conduct of operations upon said critical area, as authorized by said permit, would depreciate the reasonable market value of each of said home properties in a sum substantially in excess of $3,000, and that by the conduct of such operations, each of said petitioners would be damaged in a sum in excess of $3,000 (Tr. Vol. 1, p. 40);

(28) the defendant Gregg threatens to, and will unless restrained by an order of the Court, excavate said critical area for the commercial production of rock, sand, and gravel, as authorized by, and under the purported authority of said variance permit (Tr. Vol. 1, p. 59);

(29) said conduct of said City, is an unreasonable and oppressive exercise of its police power as to these petitioners, and is in excess of the just limits of its police power, and is in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America (Tr. Vol. 1, p. 53);

(30) said conduct of said City, constitutes a taking of the properties of these petitioners without just compensation, and without any public necessity therefor, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America (Tr. Vol. 1, p. 53);

(31) in its grant of said permit said City exercised its police power solely for the benefit of said defendant Gregg, and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America (Tr. Vol. 1, pp. 54, 55);

(32) in the circumstances of this case the defendant City was, and is, estopped to grant said permit (Tr. Vol. 1, pp. 56, 57);

(33) none of these plaintiffs has any plain, speedy, or adequate remedy at law (Tr. Vol. 1, p. 3);

(34) on November 22, 1946, an action was filed and is now pending in the California State Court by owners of properties claimed to be affected adversely by said zoning proceedings. The parties to this action in the Federal Court *were not parties* to said action in the State Court. Judgment was rendered after trial in favor of the defendants in said State case and said case is now pending on appeal in the State Courts.

(35) on November 14, 1947, this action was begun in the United States District Court by the owners of other real properties claimed to be adversely affected by said zoning proceedings. The parties plaintiff in said State case *are not parties* to this action. The District Court took jurisdiction of this case and issued a preliminary injunction and stayed further proceedings herein until the termination of said State Court proceedings. The defendants appealed, and the Circuit Court reversed.

Holding of the Circuit Court of Appeals

The honorable Ninth Circuit Court of Appeals has held (1) that under the Class Action rule these petitioners *are* parties plaintiff in the action pending in the courts of the State of California, in which they are *not named* and to which they have *not consented*, and of which they have *not accepted* any benefits, and which action was begun prior to the commencement of this action, by persons not parties to this action, and (2) that under the rule of Comity, or Necessity, the District Court should not have accepted jurisdiction in this case, and reversed the rulings of the District Court with directions to dismiss this action.

Question Involved

The principal questions here involved are:

I

Is the jurisdiction of the Federal Court to be denied to these petitioners, under the rule of Comity or Necessity, because of the pendency of a case in the State courts to which under *the law of the State of California* these petitioners are not parties, either actually or fictionally, and in which these petitioners cannot obtain the relief they sought and obtained in this action even though they were made parties to said State case.

II

Assuming the application of the Class Action rule to the case at bar, should the judgment of the Circuit Court, in the circumstances of this case, direct the doing of anything more than that which the District Court did, namely, stay further proceedings in the case at bar until the final termination of said State case?

Reasons Relied On for the Writ of Certiorari

I

The complaint states a cause of action for relief under the Fourteenth Amendment to the Federal Constitution.

The complaint alleges that the action of the defendant City, as an agency of the State, in the exercise of its police power, is unreasonable, and, therefore, is void under the federal Constitution. *This presents a federal question.*

Home Telephone Co. v. *City of Los Angeles,* 227 U. S. 278;

Raymond v. *Chicago Traction Co.,* 207 U. S. 20;

Dobbins v. *City of Los Angeles,* 195 U. S. 223;

Young, Ex parte, 209 U. S. 123;
Snowden v. *Hughes,* 321 U. S. 1;
Mugler v. *Kansas,* 31 L. Ed. 205, 211;
Crowell v. *Benson,* 76 L. Ed. 598;
Pennsylvania Coal Co. v. *Mahon,* 260 U. S. 393;
Times Mirror Co. v. *City of Los Angeles,* 3 Cal. (2d) 309.

II

The complaint pleads a special injury to the persons and properties of each of these petitioners, which is essential to the invocation of equitable relief in the Federal Courts.

Dobbins v. *City of Los Angeles,* 195 U. S. 223;
Jardine v. *City of Pasadena,* 199 Cal. 64;
Mugler v. *Kansas,* 31 L. Ed. pp. 205, 211;
Crowell v. *Benson,* 76 L. Ed. 598, 617;
Pennsylvania Coal Co. v. *Mahon,* 260 U. S. 393, 416.

The complaint pleads an invasion of the privacy of their homes by noise and dust; an interference with their personal comfort, by noise and dust, and a trespass upon their properties by dust and erosion.

The Honorable Circuit Court errs in its assumption that the *res* in this action is the same as the *res* in the pending State case. Clearly the right of each of these appellees is derived from the fact of his ownership of real property which may be injuriously affected by an unreasonable exercise of public power. It may well occur that as to one or more but less than all of the property owners involved in the two suits, the zoning action complained of would be an unreasonable and therefore void exercise of the police power because of its unreasonable interference with the enjoyment of the properties respectively of such persons, and yet as to all other property owners the zoning action complained of would be good.

It cannot be said, therefore, in any real or legal sense that the *res* in the two actions is the same. In these circumstances it is not proper for the Court to refuse jurisdiction at the instance of a property owner who may be circumstanced differently than another property owner. His complaint against the zoning power may be good, although the complaint of other property owners may be bad.

It has never been the rule or the practice, except in clear cases, to deny to any person his day in the Court of his own choice where the enjoyment of his own real property is at stake, simply because the owner of some other real property is seeking in another forum the same relief in respect of his individual property.

The actual and recognized dissimilarities in parcels of real properties, distinguishes any case in which they constitute the *res*, from the property involved in what is known as the "common fund" cases. Here there is no "common fund," and there are no properties identically situated or affected in identically the same manner in respect of the zoning action complained of.

III

California is a minority State in its application of the class action rule. In California, *it is settled law* that a complaint which pleads that it is begun and prosecuted on behalf of *"all persons similarly situated,"* although not named as parties, does not bring such parties into action, or bind them, unless they actually join in the action, or accept the benefits of the action.

Central Irr. Dist., In Matter of, 117 Cal. 382, 388;
Haese v. *Heitzig,* 159 Cal. 569, 573, 474;
Compton v. *Jessup,* 68 Fed. 263;
Howard, Ex parte, 19 L. Ed. 634;
Freeman on Judgments, Vol. I, pp. 952, 956.

There is no showing here which meets any of these conditions. These petitioners are not parties to the State case. They have never taken any part in it. They have never accepted any benefits from it.

This vital distinction, in the application of the Class Action Rule, between the law of California, and the law of the jurisdictions from which stem the cases relied upon by the Honorable Circuit Court, is completely ignored in the decisions of the Circuit Court.

IV

In the absence of the application of a class action rule which in most States, *but not in California,* binds persons similarly situated, these petitioners cannot be denied their constitutional right to invoke federal jurisdiction for redress for a violation of their immunities under the Fourteenth Amendment to the Federal Constitution.

The fact that these petitioners could have elected to pursue their remedy in the State Courts, as did the plaintiffs in the State case, does not preclude them from pursuing their remedy in the federal Court. They were not bound to make that election simply because others, who acted first, had selected the State forum.

Porter v. *Inv. Synd.*, 286 U. S. 471, 76 L. Ed. 1226;
Bacon v. *Rutland R. R. Co.*, 232 U. S. 134;
Pennekamp v. *Fla.*, 328 U. S. 331, 335.

V

Indisputably, the parties plaintiff here cannot apply for, or obtain, any relief in the pending State case, to which they are not parties either in fact or in law.

Furthermore, *if they were* now made parties plaintiff in the pending State case, they could not obtain in that case the preventive relief they seek here to maintain a *status*

quo pending a final determination of the validity of the permit challenged there and here.

This is true because in the State case there was no restraint at the time of judgment and appeal, and in those circumstances, the Appellate Courts in California have no jurisdiction to enjoin Gregg's operations pending the appeal in that case (*Hicks* v. *Michael*, 15 Cal. 107; *Napa, etc,* v. *Calistoga*, 174 Cal. 411; *McCann* v. *Union Bk.*, 4 Cal. (2d) 24, 27; *Seltzer* v. *Musicians, etc.*, 12 Cal. (2d) 718, 719; *Canavaris* v. *Theatres, etc.*, 15 Cal. (2d) 495, 500; *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 293).

For the reasons above stated the doctrine of comity does not apply. This is the clear holding of the cases hereinabove cited, and of *Merced Dredging Co.* v. *Merced County*, 67 Fed. Supp., pp. 598, 605, where the Court said:

> *"Rules of comity or convenience, must give way to constitutional rights, and when the case presented is one where a federal court of equity should intervene, it will not hesitate to do so."*

Upon the record here, it is a necessary conclusion that these plaintiffs are not precluded from pursuing their remedy in the Federal court for a violation of their immunities under the Fourteenth Amendment, simply because *other persons aggrieved,* as *to their properties,* by the same unconstitutional exercise of the police power, have pursued, and are pursuing a remedy in the State Court. The plaintiffs here are not required to hazard their constitutional rights upon the outcome of a case to which they are not parties; in the prosecution of which they have no voice; in which they cannot apply for, or obtain, any personal relief, and which is being prosecuted in a jurisdiction they did not select.

VI

The utmost which the Honorable Circuit Court of Appeals should have done, in deference to the pending of an earlier State case brought by other parties (*not these petitioners*), and involving *other properties, homes,* and *persons,* would be to stay further proceedings in this case until the termination of the State case. This the learned trial court did do. Therefore, the orders appealed from should be affirmed.

Conclusion

In conclusion, we respectfully submit that the complaint here pleads a strong and compelling case for equitable relief under the Fourteenth Amendment to the Federal Constitution; that the question presented is a Federal question cognizable in the Federal courts; that the action pending in the State courts upon behalf of persons who are *not parties* to this action, and to which the plaintiffs here are *not parties* either in fact or in law, does not bar or suspend the jurisdiction of the court in this case.

In its grant of the Preliminary Injunction here appealed from, the learned District Court did nothing more than to exercise the power conferred, and to perform the plain duty imposed, upon that court by the Constitution and the laws of the United States (*Thornton* v. *Rose Imp. Dist. No. 1,* 291 Fed. Rep. 518).

The power and the duty of the court has been clearly defined and vigorously asserted by the Supreme Court of California, in the recent case (1946), of *In re Porterfield,* 28 Cal. (2d) 91, where, speaking at page 103, the court said:

> *"We unequivocably recognize and affirm that it is the duty of courts to be most vigilant and vigorous in protecting individuals, as well as minority and majority groups, against encroachment upon their fundamental liberties."*

We believe and urge that the opinion of the Honorable Circuit Court is subject to the criticism of the dissenting opinion in 87 Lawyers Edition, page 1442, where it is said that *"The opinion of the court cuts deeply into our judicial fabric. The duty of the judiciary is to exercise the jurisdiction which Congress has conferred."*

Your petitioners present to this Court, and file herewith, a duly certified transcript of the entire record of the case, as the same appears in the Circuit Court of Appeals for the Ninth Circuit.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may be issued out of, and under the seal of this Court to the Circuit Court of Appeals for the Ninth Circuit, to the end that the judgment of said Circuit Court of Appeals for the said Circuit may be reviewed by this Honorable Court.

HENRY WALLACE WINCHESTER, ET AL.,
Petitioners;

By OLIVER O. CLARK,
Counsel for Petitioners.

(2941)